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M.C., Appellant)	
)	
and)	Docket No. 13-1147
)	Issued: July 18, 2013
DEPARTMENT OF DEFENSE, DEFENSE)	
ACCOUNTING & FINANCE SERVICE,)	
Indianapolis, IN, Employer)	
)	

Case Submitted on the Record

Before:
RICHARD J. DASCHBACH, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

On April 10, 2013 appellant filed a timely appeal from the March 15, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

The issues are: (1) whether appellant received a \$1,865.19 overpayment of compensation; (2) whether OWCP abused its discretion by refusing to waive recovery of the overpayment; and (3) whether it properly required repayment of the overpayment by deducting \$80.00 from appellant's compensation payments every four weeks.

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

OWCP accepted that on July 25, 1990 appellant, then a 44-year-old cost accountant, sustained several lumbar conditions, including a sprain, degenerative disc disease, postlaminectomy syndrome and right radiculopathy. Appellant stopped work in December 1992 and received compensation for disability.

On December 12, 2012 OWCP was notified that appellant began to receive Social Security Administration (SSA) old-age retirement benefits effective December 1, 2011 which were subject to a Federal Employees Retirement System (FERS) offset. The record contains documents showing that OWCP failed to offset these amounts for the period December 1, 2011 to December 15, 2012 in the total amount of \$1,865.19.

In a December 21, 2012 notice, OWCP advised appellant of its preliminary determination that he received a \$1,865.19 overpayment of compensation for the period December 1, 2011 to December 15, 2012 due to OWCP's failure to conduct a proper FERS offset for SSA benefits he received. It also made a preliminary determination that he was not at fault in the creation of the overpayment. OWCP advised appellant that he could submit evidence challenging the fact, amount, or finding of fault and request waiver of the overpayment. It informed him that he could submit additional evidence in writing or at prerecoupment hearing, but that a prerecoupment hearing must be requested within 30 days of the date of the written notice of overpayment. OWCP requested that appellant complete and return an enclosed financial information questionnaire within 30 days even if he was not requesting waiver of the overpayment.

Appellant requested a waiver of recovery of the claimed overpayment and in a completed financial information questionnaire received on January 22, 2012 he indicated that he had \$3,043.00 in monthly income, \$2,819.00 in monthly expenses and \$655.58 in assets. He submitted a number of financial documents supporting these figures.

In a March 15, 2013 decision, OWCP determined that appellant received a \$1,865.19 overpayment of compensation. It found that he was not at fault in the creation of the overpayment but that the overpayment was not subject to waiver. OWCP noted that waiver was not warranted because appellant's monthly income exceeded his monthly expenses by about \$224.00. It required repayment of the overpayment by deducting \$80.00 from his compensation payments every four weeks. OWCP considered appellant's financial circumstances in reaching this determination.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of FECA provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty.² Section 8129(a) of FECA provides, in pertinent part:

“When an overpayment has been made to an individual under this subchapter because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled.”³

Section 8116(d)(2) of FECA⁴ provides for limitations on the right to receive compensation and states in pertinent part:

“(d) Notwithstanding the other provisions of this section, an individual receiving benefits for disability or death under this subchapter who is also receiving benefits under [S]ubchapter [3] of [C]hapter 84 of this title or benefits under [T]itle [2] of the [SSA] shall be entitled to all such benefits, except that --”

* * *

“(2) in the case of benefits received on account of age or death under title [2] of the [SSA,] compensation payable under this subchapter based on the [f]ederal service of an employee shall be reduced by the amount of any such social security benefits payable that are attributable to [f]ederal service of that employee covered by [C]hapter 84 of this title.”⁵

ANALYSIS -- ISSUE 1

The Board finds that appellant received a \$1,865.19 overpayment of compensation. On December 12, 2012 OWCP was notified that he began to receive SSA old-age retirement benefits effective December 1, 2011 which were subject to a FERS offset. It was obligated by law to perform a FERS offset. The record contains documents showing that OWCP failed to offset these amounts for the period December 1, 2011 to December 15, 2012 in the total amount of \$1,865.19. Therefore, it properly determined that appellant received a \$1,865.19 overpayment of compensation.

² *Id.* at § 8102(a).

³ *Id.* at § 8129(a).

⁴ *Id.* at § 8116(d)(2).

⁵ *Id.* See also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.11(a)(b) (January 1997); FECA Bulletin No. 97-9 (issued February 3, 1997) (the portion of SSA benefits earned as a federal employee is part of the FERS retirement package and the receipt of FECA benefits concurrently with federal retirement is a prohibited dual benefit).

LEGAL PRECEDENT -- ISSUE 2

The waiver or refusal to waive an overpayment of compensation by OWCP is a matter that rests within its discretion pursuant to statutory guidelines.⁶ These statutory guidelines are found in section 8129(b) of FECA which states: "Adjustment or recovery [of an overpayment] by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience."⁷ If OWCP finds a claimant to be without fault in the matter of an overpayment, then, in accordance with section 8129(b), it may only recover the overpayment if it determined that recovery of the overpayment would neither defeat the purpose of FECA nor be against equity and good conscience.

According to 20 C.F.R. § 10.436, recovery of an overpayment would defeat the purpose of FECA if recovery would cause hardship because the beneficiary needs substantially all of his income (including compensation benefits) to meet current ordinary and necessary living expenses, and also, if the beneficiary's assets do not exceed a specified amount as determined by OWCP from data provided by the Bureau of Labor Statistics.⁸ According to 20 C.F.R. § 10.437, recovery of an overpayment is considered to be against equity and good conscience when an individual who received an overpayment would experience severe financial hardship attempting to repay the debt and when an individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes his position for the worse.⁹ To establish that a valuable right has been relinquished, it must be shown that the right was in fact valuable, that it cannot be regained and that the action was based chiefly or solely in reliance on the payments or on the notice of payment.¹⁰

ANALYSIS -- ISSUE 2

Appellant has not established that recovery of the overpayment would defeat the purpose of FECA because he has not shown both that he needs substantially all of his current income to meet ordinary and necessary living expenses and that his assets do not exceed the allowable resource base. He indicated that he had \$3,043.00 in monthly income and \$2,819.00 in monthly expenses. Therefore, appellant's monthly income exceeds his monthly ordinary and necessary expenses by approximately \$224.00. As his current income exceeds his current ordinary and necessary living expenses by more than \$50.00 he has not shown that he needs substantially all

⁶ See *Robert Atchison*, 41 ECAB 83, 87 (1989).

⁷ 5 U.S.C. § 8129(b).

⁸ 20 C.F.R. § 10.436. An individual is deemed to need substantially all of his monthly income to meet current and ordinary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. *Desiderio Martinez*, 55 ECAB 245 (2004). OWCP procedures provide that assets must not exceed a resource base of \$4,800.00 for an individual or \$8,000.00 for an individual with a spouse or dependent plus \$960.00 for each additional dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a) (October 2004).

⁹ 20 C.F.R. § 10.437(a), (b).

¹⁰ *Id.* at § 10.437(b)(1).

of his current income to meet current ordinary and necessary living expenses.¹¹ Because appellant has not met the first prong of the two-prong test of whether recovery of the overpayment would defeat the purpose of FECA, it is not necessary for OWCP to consider the second prong of the test, *i.e.*, whether appellant's assets do not exceed the allowable resource base.

Appellant also has not established that recovery of the overpayment would be against equity and good conscience because he has not shown, for the reasons noted above, that he would experience severe financial hardship in attempting to repay the debt or that he relinquished a valuable right or changed his position for the worse in reliance on the payment which created the overpayment.¹²

Because appellant has failed to establish that recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience, he has failed to show that OWCP abused its discretion by refusing to waive the overpayment.

LEGAL PRECEDENT -- ISSUE 3

Section 10.441 of Title 20 of the Code of Federal Regulations provide in pertinent part:

“When an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to OWCP the amount of the overpayment as soon as the error is discovered or his or her attention is called to the same. If no refund is made, OWCP shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual, and any other relevant factors, so as to minimize any hardship.”¹³

ANALYSIS -- ISSUE 3

The record supports that, in requiring repayment of the overpayment by deducting \$80.00 from appellant's compensation payments every four weeks, OWCP took into consideration the financial information submitted by appellant as well as the factors set forth in section 10.441 and found that this method of recovery would minimize any resulting hardship on appellant. Therefore, OWCP properly required repayment of the overpayment by deducting \$80.00 from appellant's compensation payments every four weeks.¹⁴

¹¹ See *supra* note 8.

¹² See *William J. Murphy*, 41 ECAB 569, 571-72 (1989).

¹³ 20 C.F.R. § 10.441(a); see *Donald R. Schueler*, 39 ECAB 1056, 1062 (1988).

¹⁴ On appeal, appellant indicated that his financial circumstances had changed and had affected his ability to repay the overpayment. However, the Board cannot consider such financial evidence for the first time on appeal. See 20 C.F.R. § 501.2(c).

CONCLUSION

The Board finds that appellant received a \$1,865.19 overpayment of compensation. The Board further finds that OWCP did not abuse its discretion by refusing to waive recovery of the overpayment and OWCP properly required repayment of the overpayment by deducting \$80.00 from appellant's compensation payments every four weeks.

ORDER

IT IS HEREBY ORDERED THAT the March 15, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 18, 2013
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board